



Office of the Attorney General
State of Texas

November 20, 1997

DAN MORALES
ATTORNEY GENERAL

Ms. Stacy Sallee
Associate Counsel
Texas Health and Human Services Commission
P.O. Box 13247
Austin, Texas 78711

OR97-2536

Dear Ms. Sallee:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 110262.

The Texas Health and Human Services Commission (the "commission") received a request for the bid proposal submitted by Deloitte & Touche Consulting Group, L.L.C. ("Deloitte & Touche") concerning the contract for Recovery of Third-Party Liability and Medical Support. You explain that the requested proposal may be proprietary in nature and protected from disclosure by the Government Code. Gov't Code § 552.007; Gov't Code § 552.305. You raise no exception to disclosure on behalf of the commission, and make no arguments regarding the proprietary nature of the requested information. You have submitted for our review a copy of the requested proposal.

Since the property and privacy rights of a third party may be implicated by the release of the requested information, this office notified Deloitte & Touche about the request for information. See Gov't Code § 552.305 (permitting interested third party to submit to attorney general reasons why requested information should not be released); Open Records Decision No. 542 (1990) (determining that statutory predecessor to Gov't Code § 552.305 permits governmental body to rely on interested third party to raise and explain applicability of exception in Open Records Act in certain circumstances). Deloitte & Touche responded to this notice and argues that seven portions of its proposal are excepted from disclosure by section 552.110 of the Government Code.

The Open Records Act imposes a duty on governmental bodies seeking an open records decision pursuant to section 552.301 to submit that request to the attorney general within ten days after the governmental body's receipt of the request for information. The time limitation found in section 552.301 is an express legislative recognition of the importance of having public information produced in a timely fashion. *Hancock v. State Bd. of Ins.*, 797 S.W.2d 379, 381 (Tex. App.--Austin 1990, no writ). When a request for an open

records decision is not made within the time period prescribed by section 552.301, the requested information is presumed to be public. See Gov't Code § 552.302. This presumption of openness can only be overcome by a compelling demonstration that the information should not be made public. See, e.g., Open Records Decision No. 150 (1977) (presumption of openness overcome by a showing that the information is made confidential by another source of law or affects third party interests). The commission first received the request for the proposal information on July 31, 1997. The commission did not seek a decision from this office until August 26, 1997. Consequently, you have not met your statutory burden. Gov't Code 552.301. Section 552.110 of the Government Code is, however, designed to protect the interests of third parties. Thus, a valid section 552.110 claim overcomes the presumption that the requested information is public. Open Records Decision No. 552 (1990) at 1. We will consider Deloitte & Touche's arguments under section 552.110

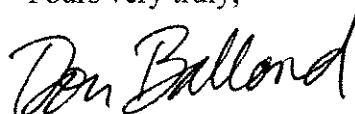
Section 552.110 protects the property interests of private parties by excepting from disclosure two types of information: (1) trade secrets, and (2) commercial or financial information obtained from a person and privileged or confidential by statute or judicial decision. Deloitte & Touche argues that seven portions of its proposal are protected from disclosure under the second prong of section 552.110: a paragraph on page A-2 in Part I; pages A-4 through A-6 in Part I (including exhibit I.A-2); part 10 of Appendix B (pages 2-3) in Part I; Exhibit I.A-3 in Part I; the names, phone numbers, and addresses of client contact references on pages A-19 through A-51 (including exhibit II.A-4) in Part II; pages B-1 through B-7 (including exhibits II.B-1, II.B-2, II.B-3, and II.B-4) in Part II; and pages C-1 through C-40 (including exhibits II.C-1 through II.C-15) in Part II.

In Open Records Decision No. 639 (1996), this office announced that it would follow the federal courts' interpretation of exemption 4 to the federal Freedom of Information Act when applying the second prong of section 552.110 for commercial and financial information. In *National Parks & Conservation Association v. Morton*, 498 F.2d 765 (D.C. Cir. 1974), the court concluded that for information to be excepted under exemption 4 to the Freedom of Information Act, disclosure of the requested information must be likely either to (1) impair the Government's ability to obtain necessary information in the future, or (2) cause substantial harm to the competitive position of the person from whom the information was obtained. *National Parks & Conservation Ass'n v. Morton*, 498 F.2d 765, 770 (D.C. Cir. 1974). A business enterprise cannot succeed in a *National Parks* claim by a mere conclusory assertion of a possibility of commercial harm. Open Records Decision No. 639 (1996) at 4. To prove substantial competitive harm, the party seeking to prevent disclosure must show by specific factual or evidentiary material, not conclusory or generalized allegations, that it actually faces competition and that substantial competitive injury would likely result from disclosure. *Id.* After examining Deloitte & Touche's arguments and the bid proposal, we find that it has established that the following information must be withheld: the marked paragraph on page A-2 in Part I; pages A-4 through A-6 in Part I (including exhibit I.A-2); and pages C-1 through C-40 (including exhibits II.C-1 through II.C-15) in Part II.

We do not believe, however, that the commission may withhold part 10 of Appendix B (pages 2-3) in Part I, the names, phone numbers, and addresses of client contact references on pages A-19 through A-51 (including exhibit II.A-4) in Part II; Exhibit I.A-3 in Part I, or pages B-1 through B-7 (including exhibits II.B-1, II.B-2, and II.B-3) in Part II. Most of these portions specifically concern this proposal's pricing and personnel information. This office has stated on many occasions that there is a legitimate public interest in the expenditure of public funds. *See* Open Records Decision Nos. 541 (1990) at 1-2, 520 (1989) at 5, 518 (1989) at 7, 233 (1980) at 2; Gov't Code 552.022(3). Moreover, this office has stated that there is a legitimate public interest in the essential facts about a financial transaction between an individual and a governmental body. *See* Open Records Decision 600 (1992). Federal cases applying the FOIA exemption 4 have required a balancing of the public interest in disclosure with the competitive injury to the company in question. *See* Open Records Decision No. 494 (1988) at 6; *see generally* Freedom of Information Act Guide & Privacy Act Overview (1995) 136-138, 140-141, 151-152 (disclosure of prices is cost of doing business with government). *Cf.* Open Records Decision Nos. 319 (1982), 306 (1982). The public has an interest in knowing the prices charged by government contractors. We do not believe that Deloitte & Touche has shown substantial harm in the release of the above cited portions of the proposal. We have marked the information in the submitted bid proposal that must be withheld.

We are resolving this matter with an informal letter ruling rather than with a published open records decision. This ruling is limited to the particular records at issue under the facts presented to us in this request and should not be relied upon as a previous determination regarding any other records. If you have questions about this ruling, please contact our office.

Yours very truly,



Don Ballard
Assistant Attorney General
Open Records Division

JDB/ch

Ref: ID# 110262

Enclosures: Marked documents

cc: Mr. Deece Eckstein
1010 Winsted Lane
Austin, Texas 78703-3848
(w/o enclosures)

Mr. Howard Blagg
Deloitte & Touche Consulting Group, L.L.C.
333 Clay Street, Suite 2300
Houston, Texas 77002
(w/o enclosures)

Mr. Stan Hinton
Baker & Botts, L.L.P.
2001 Ross Avenue
Dallas, Texas 75201-2980
(w/o enclosures)